(2)

No. 90-1379

In The

Supreme Court of the United States

October Term, 1990

STATE OF ARIZONA,

Petitioner,

v.

CHRISTOPHER REED KEMPTON,

Respondent.

Petition For Writ Of Certiorari To The Arizona Court Of Appeals

BRIEF IN OPPOSITION

MICHAEL J. DONOVAN
SUCIU, DONOVAN & SCHMITT
1763 W. 24th St., Ste. 200
Yuma, Arizona 85364
(602) 726-6892
Counsel for Respondent
Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATEMENT OF THE CASE

Several facts pertinent to the issue in this case and omitted from the petition are set forth herein. On December 15, 1988, at approximately 12:30 a.m., Agent Daniel Nordell, a members of a drug enforcement task force called Southwest Border Alliance, received information from a "confidential reliable informant" that this respondent had offered to sell the informant cocaine during the day of December 14, 1988. The informant stated that he had seen the cocaine in respondent's 1985 white Toyota truck. Although there was no specific discussion between informant and Agent Nordell as to the amount of the cocaine, it was the clear understanding of Agent Nordell that it was a small amount. Agent Nordell relayed all of this information to Agent Juan Hoke, another member of the task force, immediately after the phone call whereupon Agents Nordell and Hoke discussed the need for a search warrant, but decided not to get one.

As noted in the hearing testimony Agent Nordell testified, in part, as follows:

> "Q. And you told me that, when you give a report that there is a vehicle out running around, that one of your reliable informants has seen some narcotics in, and you haven't been able to get a registration check to the vehicle, if we find that vehicle, we stop it, and the person will be asked if he will let you take a look, and you said it's always nicer to get a consent search than to have to do it the hard way? We always ask them if they mind if we search? Did you about cover it?
>
> A. (Agent Nordell) It was in response of (sic) your statement about Mr. Kempton giving a consent of the vehicle, yes.

Q. But you were giving a general view of how you handled it there? Right?

A. I was responding that we always ask for a search of the vehicle."

During said hearing Agent Hoke testified that between 12:30 a.m. and approximately 7:00 a.m. there were three magistrates available in the area to issue a search warrant and that a warrant could have been obtained in an hour or less.

At 7:00 a.m. on December 15, Agent Hoke watched the respondent leave his residence for work in a white Toyota-truck. Agent Hoke was acquainted with the respondent and was familiar with his truck. He had contacted Officer White of the Somerton Police Department and asked Officer White to stop the respondent's truck and "make it look like a traffic stop". Based on Agent Hoke's instruction, Officer White turned on his overhead emergency lights and followed the normal police procedure for stopping a vehicle. Officer White testified that the defendant had not committed a traffic violation, and that the defendant was not under the influence of drugs or alcohol at the time of the stop. The traffic stop was made solely on the order of Agent Hoke who had told Officer White that he, Hoke, had probable cause to believe that the respondent has drugs in his truck.

Officer White asked the respondent to step from the truck. When Officer White was asked by the defendant why he was stopped he responded that Agent Hoke wanted to speak to him regarding possession of illegal drugs. Agent Hoke immediately arrived and advised the defendant that he had probable cause to believe that the respondent was in possession of illegal drugs. He then

asked the respondent if he would mind emptying his pockets. The respondent did so but no narcotics were found. Agent Hoke then asked for permission to look in the respondent's vehicle. The respondent replied, "go ahead, you're not going to find nothing."

SUMMARY OF THE ARGUMENTS PRESENTED

The Court of Appeals, State of Arizona, Division One, determined that the respondent was unconstitutionally detained without a warrant and that the consent search and the statement made to the officers were not sufficiently attenuated to prevent the exclusion of the evidence. The Court of Appeals' opinion is entirely consistent with *United States v. United State District Court*, 407 U.S. 297, 317, 92 S.Ct. 2125, 2126-37, 32 L.Ed.2d 752 (1972) and *United States v. Martinez-Fuertes*, 428 U.S. 543, 565, 96 S.Ct. 3074, 3086, 49 L.Ed.2d 1116 (1976). The exigencies which create the automobile exception are the lack of time to get a warrant and the mobility of the vehicle. This is a carefully crafted exception to the constitutional warrant requirement and must be narrowly tailored to the circumstances that justify its creation.

REASONS FOR DISALLOWANCE OF WRIT

LAW ENFORCEMENT WAS NOT JUSTIFIED IN STOPPING THE RESPONDENT AND SEARCHING HIS TRUCK WITHOUT FIRST OBTAINING A SEARCH WARRANT.

The Court of Appeals, State of Arizona Division One, has reviewed the automobile warrant exception and its applicability to the Respondent's case. Said Court has clearly enunciated its reasoning and identified with particularity the circumstances which render the automobile warrant exception inapplicable.

Each of the specifically established and well delineated exceptions to the constitutional warrant requirement must be narrowly tailored to the circumstances that justify their creation. *Florida v. Royer*, 460 U.S. 491, 499-500, 103 S.Ct. 1319, 1325, 75 L.Ed.2d 329 (1983); *Chimel v. California*, 395 U.S. 752, 762-763, 89 S.Ct. 2034, 2040, 23 L.Ed.2d 685 (1969); *Terry v. Ohio*, 392 U.S. 1, 19, 25-26, 88 S.Ct. 1868, 1878-79, 1882, 20 L.Ed.2d 889 (1968). It is the time of such special circumstances which is an issue in respondent's case.

The automobile exception as noted by petitioner is based, in part, upon the impracticability of obtaining a warrant to search an automobile. *Carroll v. United States*, 267 U.S. 132, 159-60, 45 S.Ct. 280, 287, 69 L.Ed.2d 543 (1925). Therein, the court held that a warrantless search of an automobile was legal if probable cause existed to believe "that an automobile or other vehicle contains that which by law is subject to seizure and destruction." *Carroll*, 267 U.S. at 149. Such circumstances must be balanced with the essential constitutional requirement that police procure a warrant prior to a search.

Herein the Court of Appeals noted that basic exigencies which apply to the automobile warrant exception simply did not exist in respondent's case. Said exigencies being lack of time to obtain a warrant and mobility of a vehicle. *Coolidge v. New Hampshire*, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). The information that respondent had been in possession of a narcotic drug at some time on December 14, 1988 was provided 6½ hours prior to the search of respondent's truck. The record clearly reflects that neither Agent Nordell nor Hoke were in the slightest fear of respondent fleeing the jurisdiction. Further, Agent Hoke was acquainted with the respondent and familiar with his truck, knew where respondent lived as well as where he worked. The limited information provided to Agent Nordell strongly suggested that the respondent would remain in the small community of Somerton where he resided and worked.

In this small community there exists simplified procedures for obtaining a search warrant based on exigent circumstances. Such a search warrant may be obtained in less than an hour from any of three magistrates who are energetic and willing to assist law enforcement with such matters. This, of course, presumes that there is probable cause to support such a warrant. Probable cause which would have been reviewed by a detached and neutral magistrate before the issuance of any search warrant. *United States v. United States District Court*, 407 U.S. at 317. Such an expeditious search warrant procedure clearly minimizes the inconvenience to law enforcement but maximizes the prevention of hindsight from coloring the evaluation of the reasonableness of the search and seizure. *United States v. Martinez-Fuertes*, 428 U.S. at 565.

In lieu of taking advantage of the expeditious procedures for obtaining a search warrant in Somerton, Arizona, the record reflects that the agents in question implemented a regular practice of simply stopping a vehicle and asking for consent to search. If in fact such consent was denied then the officers would determine if it was practical to get a warrant. The apparent reasoning by the agents in question was that small drug cases are commensurate with lessor constitutional rights. Such is not the case, a warrant is required before search or seizure can occur unless one of the exceptions to the no requirement applies. Herein the warrantless search of the respondent's vehicle is not authorized by the existence of any emergency or exigencies which would not allow a judicial officer to evaluate and act upon applications for a warrant. *Chambers v. Maroney*, 399 U.S. 42, 51, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970). The Arizona Court of Appeals' conclusion that the law enforcement officers were not justified in stopping and searching the respondent herein is supported by the record.

The Arizona Court of Appeals further reviewed the consent as given by the respondent and determined that the constitutional conduct in stopping the vehicle was not sufficiently attenuated from the subsequent seizure to characterize the consent as being voluntary. *Brown v. Illinois*, 422 U.S. 590, 602-04, 95 S.Ct. 2254, 2261, 62, 45 L.Ed.2d 416 (1985). In that the search occurred almost immediately after Officer White stopped the respondent, there was a temporal proximity between the unconstitutional conduct and the consent. Furthermore, there were no intervening circumstances between the police conduct and the consent. Lastly, the misconduct by the police was

clear. Agent Nordell felt that since the defendant was simply a small dealer with a small amount of contraband, the effort of obtaining a warrant was not palatable. There can be no conclusion other than that the stop was made to obtain a consent search and for no further reason. Accordingly, the circumstances surrounding consent were appropriately characterized by the Court of Appeals as unconstitutional conduct. *United States v. Taheri*, 648 F.2d 598, 601 (9th Cir. 1981).

As noted in the Arizona Court of Appeals opinion "when police purposely effect an illegal detention in the hope that a consent search or custodial interrogation will yield incriminating evidence and statements, the exclusionary rationale is especially compelling. See *United States v. Perez-Esparza*, 609 F.2d 1284, 1289-90 (9th Cir. 1979)." The Court of Appeals' decision is well considered and consistent with the basic constitutional rule that a search or seizure is per se unreasonable unless it is supported by a warrant or falls within one of the few specifically established and well delineated exceptions to the constitutional warrant requirement. Such exceptional circumstances were not present based upon the facts of record and accordingly the granting of a Petition of Writ of Certiorari should be denied.

CONCLUSION

No interest is served by granting the Petition for Writ of Certiorari. The factual record is clear and concise and supports the Court of Appeals', State of Arizona, decision. The exceptions to the constitutional warrant

requirement must be narrowly tailored to the circumstances that justify their creation. Herein, the exigencies which have lead to the creation of the automobile exceptions are nonexistent in the facts of record. Furthermore, the unconstitutional conduct in stopping the respondent's vehicle in a manner consistent with "convenient" law enforcement was not sufficiently attenuated from the subsequent seizure and tainted the consensual search of respondent's vehicle. The exclusion of evidence in respondent's case was appropriate and should not be set aside.

Respectfully Submitted,

MICHAEL J. DONOVAN
SUCIU, DONOVAN & SCHMITT
1763 W. 24th St., Ste. 200
Yuma, Arizona 85364
(602) 726-6892
Counsel for Respondent
Counsel of Record